IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NUMBER 83 OF 2005
IN
ARBITRATION PETITION NO. 408 OF 2004

Messrs Goldcrest Exports ..Petitioners.

Vs.

Messrs Swissgen N.V. & Anr. ..Respondents.

Mr.M.Vasudeo with Mr. A.M.Jaykar i/b Messrs Khaitan and Jaykar for the petitioners.

Mr.Zal Andhyrujina with V.Gurumurthi and Ms.A.Malhotra for the respondents.

CORAM: A.P.SHAH And
S.J.VAZIFDAR, JJ.

DATED: 28TH FEBRUARY, 2005

ORAL JUDGMENT : (Per S.J. Vazifdar, J.)

This is an appeal against the order of the learned single Judge dismissing the appellants petition filed under section 34 of The Arbitration and Conciliation Act, 1996 to challenge an award passed by the second respondent, The Federation of Oils, Seeds and Fats Associations Ltd. (FOSFA).

2. The two questions, both of which we have answered in the negative, that arise for our consideration are :

i) Whether a party against whom a foreign award is made is entitled to challenge the same under section 34 of the Act ?

ii) Whether the mere denial of the existence of the agreement by the party against whom an award is made is entitled to challenge the same under section 34 if the award otherwise would be a foreign award and despite the party in whose favour the award is made stating that it treats the award as a foreign award and shall not either seek its enforcement or rely upon the same for any purpose as a domestic award.

3. The controversy lies in a very narrow compass. The first respondent's case is that two contracts dated the 19th September 2003 and 24th September 2003 were entered into between the petitioner/appellant and the first respondent by which the appellant agreed to sell to the respondent a certain variety of sesame seeds. Each of these contracts incorporates an arbitration agreement contained in the International Rules of Arbitration and Appeal. The appellant has denied that these contracts were entered into. The appellant seeks to establish the maintainability of this petition in

view of this defence.

4. At the outset it is necessary to note two important aspects. Firstly if the existence of the contracts is established there admittedly is a valid arbitration clause by incorporation, governing them. Secondly the impugned award in that event would admittedly be a foreign award within the meaning of that expression in the 1996 Act.

5. Mr. Vasudeo however submitted that the petition under section 34 of the 1996 Act is maintainable for two reasons. Firstly he submitted that the petition is maintainable in view of the judgement of the Supreme Court in *Bhatia International versus Bulk Trading S.A. and Anr. (2002) 4 SCC 105*. Secondly, he submitted that in view of the appellants denial of the existence of the said contracts the petition to challenge the award is maintainable under section 34 and that it is not necessary for the appellant to challenge the same only if and when the first respondent seeks enforcement thereof. The submissions are not well founded.

6. As we are concerned presently only with the question of maintainability of the petition it is necessary for us to refer to the facts only briefly.

As stated by us above, the first respondent's case is that two contracts dated 19th September 2003 and 24th September 2003 were entered into between the appellant and the first respondent under which the first respondent was to sell to the appellant certain varieties of sesame seeds on the terms and conditions mentioned therein. Among the various documents the contracts expressly incorporated the FOSFA Terms clause 27 whereof pertains to arbitration and clause 25 reads as under: -

> "25. DOMICILE: This contract shall be deemed to have been made in England and the construction, validity and performance thereof shall be governed in all respects by English law. Any dispute arising out of or in connection therewith shall be submitted to arbitration in accordance with the Rules of the Federation....."

The said the rules in turn inter-alia provide as under: -

> "Any dispute arising out of a contract or contracts subject to these rules, including any questions of law arising in connection therewith, shall be referred to arbitration in London (or without prejudice to the juridical seat elsewhere if so agreed in accordance with the Arbitration Act, 1996 and any

statutory modification or re-enactment thereof for the time being in force. The juridical seat of the arbitration shall be, and is hereby designated pursuant to Section 3of the Arbitration Act 1996 as, England.

5. Jurisdiction (a) The arbitrators may rule on their own jurisdiction as to whether there is a valid arbitration agreement. If arbitrators agree that they have no jurisdiction they shall jointly advise the parties in writing."

7. The first respondent contended that valid and binding agreements had been entered into between the appellant and themselves in the form of the aforesaid letters dated 19th and 24th September 2003. The appellant however refused to perform the contracts contending that no contract duly signed by both the parties had come into existence and that there was no concluded contract between them. The appellant contended that the brokers note sent out by the broker was not signed by the parties and that there was therefore no concluded contract inasmuch as the same did not create any obligations on either side. The appellant accordingly refused to perform its obligations of effecting sales under the said contracts.

The first respondent treated the same as an anticipatory breach of contract, claimed damages

from the appellant and invoked the aforesaid arbitration clause. The appellant reiterated its aforesaid contention before the learned arbitrators. The arbitrators came to the conclusion that a valid and binding agreement had been entered into between the parties as contained in the said letters dated 19th and 24th September 2003 and that accordingly there was a valid arbitration clause between the parties which had been validly invoked by the first respondent. On merits, with which we are not presently concerned, the arbitrators came to a conclusion that the Appellant had committed anticipatory breach of the contract and accordingly made an award in favour of the first respondent in the sum of US dollars 81,225 being the difference between the contract price and the market price on the date of default.

8. Mr Vasudeo firstly contended that even assuming that the said the award was a foreign award within the meaning of that expression in the 1996 Act the appellant is entitled to challenge the same under section 34 of that Act in view of the judgement of the Supreme Court in *Bhatia International v. Bulk Trading S.A. & Anr. (2002) 4 SCC 105*. The submission is not well founded.

9. The question before the Supreme Court in *Bhatia International* was whether an application under section 9 of the 1996 Act is maintainable in respect of an international commercial arbitration where the place of arbitration is not in India . The Supreme Court answered the question in the affirmative. Mr Vasudeo relied upon the first part of paragraph 26 of the said judgement. The paragraph read as a whole however indicates the fallacy in the contention. Paragraph 26 reads as under:-

> "26. Mr Sen had also submitted that Part II, which deals with enforcement of foreign awards does not contain any provision similar to Section 9 or Section 17. As indicated earlier, Mr Sen had submitted that this indicated the intention of the legislature not to apply Sections 9 and 17 to arbitrations, like the present, which are taking place in a foreign country. The said Act is one consolidated and integrated Act. General provisions applicable to all arbitrations will not be repeated in all Chapters or Parts. The general provisions will apply to all Chapters or Parts unless the statute expressly states that they are not to apply or where, in respect of a matter, there is a separate provision in a separate Chapter or Part. Part II deals with enforcement o foreign awards. Thus Section 44 (in Chapter I) and Section 53 (in Chapter II) define foreign awards, as being awards covered by arbitrations under the New York Convention and the Geneva Convention respectively. Part II

> then contains provisions for enforcement of foreign awards which necessarily would be different. For that reason special provisions for enforcement of foreign awards are made in Part II. To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards. It must immediately be clarified that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded the provisions of Part I will also apply to foreign awards. The opening words of Sections 45 and 54, which are in Part II, read notwithstanding anything contained in Part I. Such a non obstante clause had to be put in because the provisions of Part I apply to Part II." (emphasis supplied)

10. The portion emphasised by us establishes that to the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards. It is only in the absence of such provisions that the provisions of Part I have been held to be applicable to foreign awards. It is necessary therefore to examine whether there exist special provisions in the 1996 Act for challenging foreign awards. The answer to

this question is in the affirmative.

11. Sections 34, 47, 48 and 49 of the 1996 Act are

relevant in this regard and read as under: -

> "**34. Application for setting aside arbitral award.-**(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
>
> (2) An arbitral award may be set aside by the Court only if -
>
> (a) the party making the application furnishes proof that-
>
> (i) a party under some incapacity, or
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agr eement, was not in accordance with this Part; or

the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.- Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of

time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

"**47. Evidence.**-(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the Court-

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) the original agreement for arbitration or a duly certified copy thereof; and

(c) such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation.- In this section and all the following sections of this Chapter, Court means the Principal Civil Court of Original Jurisdiction in a

district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such Principal Civil Court, or any Court of Small Causes."

"**48. Conditions for enforcement of foreign awards.**-(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the Court proof that-

(a) the parties to the agreement referred to in Section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to

arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that-

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

Explanation.- Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict

with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and m y also, on the application of the party claiming enforcement of the award, order the other party to give suitable security".

"**49. Enforcement of foreign awards.-**Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court."

12. Sections 47, 48 and 49 deal specifically and exclusively with foreign awards. In particular section 48 deals with the refusal by the court to enforce a foreign award at the request of the party against whom it is invoked. The section also contains limitations on the part of the court in refusing to enforce a foreign award. It is pertinent to note that sub-section (1) specifically states that enforcement of the award is to be refused at the request of the party against whom it is invoked implying thereby, if not expressly stating, that a party against whom a foreign award is sought to be enforced is entitled to make an application to the concerned court for refusal by

that court to enforce the foreign award. Under section 49 it is only when the court is satisfied that the foreign award is enforceable under the chapter that the award shall be deemed to be a decree of that court.

It is thus clear that Part II specifically provides a separate provision not merely for the enforcement of foreign awards but even for the challenge thereto by the party against whom it is sought to be enforced.

13. Mr.Vasudeo relied upon a judgment of a learned Single Judge of the Delhi High Court in *Shivnathrai Harnarain v. Italgrani S.P.A. 2001(3) RAJ, 518.* The Judgment was in the Defendant's Application under Order VII Rule 11 of the Code of Civil Procedure and section 45 of the Arbitration and Conciliation Act, 1996 concerning the maintainability of the suit on the ground that there was a valid arbitration clause. The application was dismissed. Mr.Vasudeo relied upon the observations in paragraph 13 of the judgment which reads as under :

> "13. Since the factum of existence of the agreement and that too in

> writing has been disputed by the plaintiff, this would be one of the issues, may be a preliminary issue, to be decided by this Court as under Part II, the Arbitrator has not been bestowed with the power of ruling on its own jurisdiction or ruling on objections with respect to existence or validity of the arbitration agreement. Under Part II, such power vests in the Court and not with the Arbitrator."

14. The judgment is of no assistance to Mr.Vasudeo. It was delivered in a suit. The question we are concerned with presently is whether an application to set aside the award is maintainable under section 34 of the Act and not whether a suit is maintainable where the Plaintiff alleges that the agreement was never entered into.

Mr.Vasudeo relied upon the above observations in support of his contention that Part II of the Act does not permit a challenge to an award on the ground of the factum of its existence. He submitted therefore that in view of the judgment of the Supreme Court in *Bhatia's* case, the Petition under section 34 is maintainable. We are afraid this is a complete misreading of the judgment in *Bhatia's* case. Firstly, it is a moot point whether under Part II and, in particular, section 48 thereof, a party against whom the award is made cannot resist

the enforceability on the ground that there was no agreement in existence. We will assume however in Mr.Vasudeo's favour that this is so. It would make no difference. Merely because the legislature has specified only certain grounds of challenge to a foreign award, it does not follow that in respect of all other grounds the petition challenging the award is maintainable under section 34 of the Act. There is nothing in the judgment in *Bhatia's* case that warrants such an interpretation. Had that been the case, the entire scheme of the 1996 Act would have been different.

15. F.I.Rebello J in *Force Shipping Ltd. v. Ashapura Minechem Ltd. 2003 (7) LJSOFT 58* held as under :-

> From the portion reproduced above, it is clear that the law on the subject may be summarized thus:
>
> > "(a) When there are general provisions under the statute unless statute expressly states that they are not to apply then in that event, the general provisions would apply.
> >
> > (b) When the statute provides special provisions for enforcement it is the special provisions which would apply and not the general provisions. In the instant case

> there are special provisions for enforcement of foreign awards. Once therefore, there are special provisions for enforcement of foreign Awards then the general provisions including provisions of challenge to the award considering the special provisions would be excluded. That would mean application of Part II, once that be so, Part I would not apply. Under Part I a decree can be executed only if the challenge under Section 34 fails if made. Under Section 48, the foreign awards become enforceable and is to be executed as a decree.
>
> (c) On the consideration of the law set out in Paragraph 28 in so far as application of section 9 is concerned, it holds that section 9 would not apply in so far as foreign awards are concerned after the award is made.
>
> From the Judgment in Bhatia, therefore, these are three major propositions which can be culled out. Once that be the case, the first contention advanced on behalf of the Respondent opposing enforcement of the foreign award must be rejected."

We are in respectful agreement with the judgment. In the circumstances in respect of foreign awards the remedy of a party against whom the award is sought to be enforced lies only under section 48 of the 1996 Act and not by way of an application under section 34.

16. This Court has in some cases held that in

respect of a foreign award a separate application under section 48 is not maintainable and that the only remedy of a party against whom a foreign award is made is to oppose the enforcement of the award when enforcement thereof is sought by the party in whose favour it is made. It was contended on the other hand in those cases that an application to challenge a foreign award is maintainable before or even in the absence of an application for the enforcement thereof.

17. It is not necessary for us to decide this question as the present application is made only under section 34 and not under section 48 of the said Act. The answer to this question either was would not establish the maintainability of a Petition under section 34 to challenge a foreign award.

18. If it is held that an application to challenge a foreign award is maintainable under section 48 before or even in the absence of an application for the enforcement thereof, an application under section 34 would clearly not be maintainable for in that event Part II would be held to have provided a specific provision for the challenge to a foreign award.

19. In our opinion however even if this question is answered in the negative the provisions of section 34 are not available to challenge a foreign award. We proceed therefore at this stage on the basis that under Part II a party aggrieved by a foreign award is not entitled to maintain an application for the challenge to a foreign award before or in the absence of an application for the enforcement thereof. Part II in any event provides an opportunity for a party aggrieved by a foreign award to oppose the enforcement thereof. It however restricts the circumstances in which such right can be exercised. The scheme of the Act indicates clearly the intent of the legislature to provide a party with a right to challenge a foreign award only in certain circumstances. By necessary implication it excludes the right of a party to challenge a foreign award except in cases where the enforcement thereof is sought.

20. It is true that in some cases, including in the impugned judgement, it has been held that the grounds for challenging a domestic award and of a foreign award under sections 34 and 48 of the Act respectively are identical. There are however certain nuanses, albeit minor, which indicate quite

clearly that the provisions of section 34 do not and cannot apply to a foreign award.

21. The scheme of section 48 and the language used therein clearly establishes that the provisions thereof pertain to a foreign award. This is not so in the case of section 34. For instance under section 48 (1) (a) the incapacity of a party against whom an award is made is to be determined under the law applicable to them. This provision is inapplicable to a similar challenge under section 34. Further under section 48 (1) (a) the enforcement of a foreign award may be refused if the party against whom it is made furnishes proof to the court that the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. The corresponding provision in section 34 does not provide the latter qualification viz. "under the law of the country where the award was made".

22. Thus even assuming that the grounds of challenge to an award under sections 34 and 48 are identical the circumstances in which and the manner in which the defence is applicable are different. Section 34 therefore by necessary implication does

not apply to foreign awards. The judgement of the Supreme Court in *Bhatia's* case (supra) is therefore inapplicable.

23. To hold to the contrary would lead to absurd results. It would permit a party aggrieved by a foreign award a right to challenge the same both under sections 34 and 48 of the Act. The applicable law on the basis whereof an award is challenged would be different under the two sections. This is clearly not the intention of the Legislature It would involve legislation, an exercise not open to this Court.

24. Mr Vasudeo then submitted that the said award is not a foreign award within the meaning of that expression in the 1996 Act. This submission too is not well founded for two reasons.

25. Firstly the contention that the said award is not a foreign award was taken for the first time only at the hearing before us. Before the learned single judge the appellant admitted and proceeded on the basis that the said award is a foreign award. The learned judge was invited to and accordingly proceeded on that basis as is clear from the impugned order.

26. Mr Vasudeo however submitted that no such statement was made before the learned Judge and that the Appellant therefore intends applying for an application for speaking to the minutes of the impugned order. Even assuming this to be so it would not carry the appellant's case further. The submission is in any event not well founded. Mr.Andhyrujina the learned counsel appearing on behalf of the first respondent, stated that the first respondent considered the said award to be a foreign award and not a domestic award. He further stated that the first respondent therefore would not seek to enforce the award as a domestic award and would seek its enforcement in accordance with the provisions of Part II of the Act.

27. A conjoint reading of sections 47 48 and 49 of the Act made it clear that a foreign award is not enforceable without the party in whose favour it is made applying for the enforcement thereof. Further it is only upon the satisfaction of the court that the foreign award is enforceable under the said chapter that the award shall be deemed to be a decree of that court. In other words a foreign award cannot be executed as a decree unless and until an application for enforcement thereof is made

and the court is satisfied that the foreign award is enforceable.

28. If a party, such as the first respondent, in whose favour an award has been made expressly states that he would not rely upon the award as a domestic award in any manner and that he would not enforce the same either as a domestic award there would be no question of the party against whom such an award has been made challenging the same. This is so in the present case. There can therefore be no fear that the first respondent would seek to enforce the said award as a decree under section 36 of the act. Thus as and when the first respondent seeks to enforce the award as a foreign award under Part II it will always be openly to the appellant to challenge the enforcement thereof under section 48 of the Act.

29. In the circumstances the appeal is dismissed. There shall however be no order as to costs.